

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 May 2023

**Public Authority:** Ministry of Defence  
**Address:** Whitehall  
London  
SW1A 2HB

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Ministry of Defence ('MOD') seeking a copy of his late father's medical record for particular periods in 1941 and 1948. The MOD confirmed that it held information falling within the scope of the request but refused to disclose this on the basis of section 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the MOD is entitled to refuse to disclose the information on the basis of section 41(1) of FOIA.
3. No steps are required.

#### **Request and response**

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4. The complainant wrote to the MOD on 9 November 2022 and sought the following information:

"Request for Access to Deceased Patients Health Records

Please find attached the following (scanned) documents:

1. Application for Health Records of a Deceased Individual

2. Photographic Proof of Identity.
3. Proof of Address – Credit Card Statement.
4. Deed Poll for [Deceased Father's name] (1954)
5. Birth Certificate [Complainant's name] .

I trust that you have the required information to be able to process my application.”

5. The MOD contacted the complainant on 14 November 2022. It explained that the Access to Health Records Act ('AHRA') provides certain individuals with a right of access to the health records of a deceased individual. However, this was only applicable to records created after 1 November 1991. As the information requested predates the AHRA, the MOD said it was unable to release the requested records. The MOD went on to say that if the complainant believed there was information in the medical record to assist the ongoing treatment of a family member, the complainant's health consultant could write to the MOD and its Medical Governance Officer would ascertain whether it held any information which would assist.
6. On 16 November 2022, the complainant replied to the MOD asking: “.what statute prevents me accessing medical records from 1941 for my father who died in 1986... .” He also added that he had obtained his late father's service record which contained the following:

“I found out that my father had a [redacted] problem on 10 May 1941 from the 305 (Polish) Squadron Operations Record Book, where it is recorded quite clearly.... The operational documents clearly mention the date my father was admitted to RAF Hospital Rauceby and the date he was discharged (he was in hospital for 16 days). ...The illness my father had is a piece of the jigsaw puzzle I am working on.”
7. The MOD replied that same day referring again to the AHRA and also stated that medical records are exempt from disclosure under section 41(1) FOIA.
8. On 17 November 2022, the complainant requested an internal review. He said:

“Notwithstanding the AHRA and FOIA I cannot for the life of me see what real reason there is for denying me access to those medical records from 1941 – I cannot understand the reasoning behind these parts of the legislation. There must be a statute of limitations to say after a certain time those records become open to the public! The

records I require are from 81 years ago, and my father died 36 years ago, so why can I not have the information I want”.

9. On 20 December 2022, the complainant also asked the MOD to provide information on his deceased father’s admission to the 5th General Polish Hospital in East Everleigh near Salisbury on 20 January 1948 and details of his illness at that time.
10. In January 2023, the complainant wrote again to the MOD saying:  
“I am busy writing a biography of my father’s life for his grandchildren (my 3 boys and my niece and nephew). I will self-publish the book and make a few copies for my immediate family only.”
11. The MOD responded to the internal review on 16 March 2023. It confirmed that it held information falling within the scope of the request. However, it upheld the MOD’s original decision that the information was considered to be exempt from disclosure under FOIA on the basis of section 41(1) (information provided in confidence).

## **Scope of the case**

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12. The complainant contacted the Commissioner on 22 March 2023 to complain about the MOD’s decision to withhold the requested information on the basis of section 41(1) FOIA. He said:  
“My father died in 1986, and the 2 medical records are from 1941 and 1948, so I see no reason why these medical records should not be released to me, unless my father, at the time of hospitalisation, stated clearly that he did not want his medical records released”.

## **Reasons for decision**

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### **Section 41 – information provided in confidence**

13. Section 41(1) of FOIA states that:  
‘(1) Information is exempt information if—  
(a) it was obtained by the public authority from any other person (including another public authority), and  
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.’

14. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.
15. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
  - whether the information had the necessary quality of confidence;
  - whether the information was imparted in circumstances importing an obligation of confidence; and,
  - whether an unauthorised use of the information would result in detriment to the confider.
16. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure. Although, it is still necessary to show that disclosure of such information would be an unauthorised use of the information.
17. The Commissioner has assessed each of these criteria in turn, taking into account the submissions provided to him by both the MOD and the complainant.

Was the information obtained from another person?

18. With regard to the requirements of section 41(1)(a), the Commissioner accepts that medical records will constitute information which was received by a third party. Therefore the Commissioner is satisfied that section 41(1)(a) of FOIA is met.<sup>1</sup>

Does the information have the necessary quality of confidence?

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<sup>1</sup> Paragraph 13 of the Commissioner's guidance on section 41 notes that information including a doctor's observations of a patient's symptoms recorded during a consultation and an x-ray image of a patient taken by hospital are examples of information which will meet the criterion on section 41(1)(a). <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

19. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and it is more than trivial.
20. The Commissioner is also conscious of the comments of Eady J in a case involving a request to the Home Office to which section 41 of FOIA was applied: '... [it was] beyond question that some information, especially in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent "quality of confidence".<sup>2</sup>
21. The Commissioner is satisfied that the requested information has the quality of confidence. The information is clearly not trivial, nor is it in the public domain.

Was the information imparted in circumstances importing an obligation of confidence?

22. The MOD argued that it attaches great importance to the confidential nature of the relationship between patients and Service medical practitioners and, as medical records relating to a deceased service person contain information which the patient would have expected to remain confidential, it would not wish to undermine that relationship. The Commissioner also appreciates the MOD's previous experience of disclosing information from service records and the potential consequences for relatives of service personnel of doing so. In light of this experience, he understands the MOD's cautious approach to the disclosure of information from historical service records. Further, the MOD argued that it was reasonable to suppose that patients with medical records created before the introduction of the Access to Health Records Act (AHRA) 1990<sup>3</sup> had an understanding and expectation that their sensitive medical information would be kept confidential even after their death. The MOD argued that it therefore had an enduring obligation of confidence towards former members of the Armed Forces.
23. The Commissioner appreciates the complainant's position that, given the age of the medical information, he did not understand why he was being refused access to the requested information or to know whether it had a

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<sup>2</sup> Secretary of State for the Home Office v British Union for the Abolition of Vivisection & Anor [2008] EWHC 892 (QB) (25 April 2008), paragraph 33

<sup>3</sup> This legislation establishes 'a right of access to health records by the individuals to whom they relate and other persons.' <https://www.legislation.gov.uk/ukpga/1990/23/introduction>

bearing on the health of any living relations. However, for the purpose of this decision notice it is vital to distinguish between disclosure of medical records of the deceased to family members (for example under the AHRA) and disclosure of information under FOIA.

24. Under FOIA, disclosure of information is said to be disclosure to the 'world at large.' It is the equivalent of the MOD publishing the information on its website, notwithstanding the fact that the complainant has stated he will self-publish a book for his immediate family only. Consequently, any rights of access that a specific individual may have to a deceased family member's medical records, under AHRA or other potentially relevant legislation, are not relevant to the application of section 41 of FOIA. Taking this into account, the Commissioner is of the view at the time that the medical records were created the complainant's father would not have expected such information to be disclosed to the world at large.
25. The Commissioner is therefore satisfied that this criterion is met.

Would disclosure be of detriment to the confider?

26. As noted above case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure. The Commissioner considers that, as medical records constitute information of a personal nature, there is no need for there to be any detriment to the confider in terms of tangible loss, in order for it to be protected by the law of confidence.
27. The Commissioner notes that the complainant has implied he does not mind about his late father's medical information being made public. However, the Commissioner considers that the knowledge that confidential information has been passed to those whom the confider would not willingly convey it to, may be sufficient detriment<sup>4</sup>.
28. In this case, the Commissioner considers that disclosure would be contrary to the deceased person's reasonable expectation of maintaining confidentiality in respect of his medical records. He therefore considers the absence of detriment would not defeat a cause of action.

Is there a public interest defence to the disclosure of the information?

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<sup>4</sup> EY v ICO & Medicines and Healthcare Products Regulatory Authority [EA/2010/0055] para 13.

29. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.
30. The Commissioner is therefore required to consider whether the MOD could successfully rely on such a public interest defence to an action for breach of confidence in this case.
31. The complainant explained that he could not see what real reason there is for denying him access to medical records from 1941. His Father's Squadron's Operations Record Book for 1941 clearly mentions that his father was forced to abort his 6th bombing mission and was later hospitalised. He argued that if he could now obtain declassified military information, why could he not obtain medical records relating to the same incident in order to write a family history.
32. The Commissioner recognises and appreciates the complainant's strong personal interest for wanting to access the requested information. Some of the information may be considered to be relatively innocuous and was obtained many decades ago. However, as noted above, the Commissioner would again emphasise the distinction between disclosure of such information under FOIA and a private or limited disclosure of information to the next of kin. Whilst the Commissioner acknowledges the complainant's desire to write a family history, in terms of a disclosure under FOIA, the Commissioner considers that there is a particularly strong public interest in ensuring that patient confidentiality, and furthermore, that the relationship between patients and Service medical practitioners is not undermined. When patients receive treatment from doctors and other medical professionals, they do so with the expectation that information will not be disclosed to third parties without their consent. It is in the public interest that confidences should be respected. The Commissioner also believes there is a public interest in ensuring that an employee can give their employer all necessary private or domestic information about themselves with the certainty that it will be held by the employer in confidence and only used for specific purposes that are within an employee's reasonable expectations.
33. Overall, the Commissioner is mindful of the need to protect the relationship of trust between confider and confidant; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority. He finds that the

public interest in preserving the trust between doctor and patient to be particularly weighty.

34. For these reasons, the Commissioner has concluded that there is not a sufficiently compelling argument in support of a public interest defence against an action for breach of confidence.

### **Other matters**

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35. FOIA does not impose a statutory time within which internal reviews must be completed albeit the section 45 Code of Practice explains that such reviews should be completed within a reasonable period.<sup>5</sup> In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.<sup>6</sup>
36. In this case, the Commissioner is concerned that the MOD took more than 80 working days to respond to the internal review and therefore failed to meet the timescales set out in the Commissioner's guidance.
37. The Commissioner also notes that MOD advised the complainant that, if he believed that there may be information within the medical record that might assist with the ongoing treatment of a family member, the complainant could request that person's healthcare provider (consultant) to write to the MOD and, if any relevant information is located, it will be sent directly to them. The Commissioner welcomes the fact that the MOD has provided this advice and assistance to the complainant but he is unable to order disclosure of this information as part of this decision notice for the reasons given above.

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<sup>5</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

<sup>6</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#20>



## Right of appeal

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38. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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